86-2031

No. _____

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1986

BOARD OF SCHOOL COMMISSIONERS
OF MOBILE COUNTY, et al.,

Petitioners,

v.

EDWIN FOSTER, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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The respondents Edwin Foster, James

E. Buskey and the class they represent, respectfully request that this Court deny the Petition for Writ of Certiorari, seeking review of the Eleventh Circuit's opinion in this case. That opinion is reported at 810 F.2d 1021.

The Statement of Facts in the Petition is not an accurate recitation of the evidence in the record, but a sufficient statement of the facts appears in the Eleventh Circuit's opinion, 810 F.2d at 1022-1023.

REASONS WHY THE WRIT SHOULD BE DENIED

1. No substantial question is presented: the Petition asks this Court to review findings for abuse of discretion by the trier of fact.

The Petition concedes that the

district court's purported failure adequately to distinguish lawyer hours related to successful and unsuccessful claims "is subject to an abuse of discretion standard" (Pet., p.11), and contend, as they must, that "[t]he District's Order [sic] abused the Court's discretion" (Pet., p.12).

The Eleventh Circuit Court of Appeals correctly applied a clearly erroneous standard to review Petitioners' contention that plaintiffs' counsel failed to keep adequate time records, 810 F.2d at 1024, and Petitioners do not contend that the Court of Appeals erred in applying that standard of review.

In short, no question of law is presented by the Petition and any review of the district court's award of

attorneys' fees would be on the basis of the abuse of discretion and clearly erroneous standards.

2. The fact intensive question of the adequacy of plaintiffs' time records has already been reviewed three times.

The issue of whether plaintiffs' time records and other explanations of their labor were sufficient to determine an award of attorneys' fees is by its nature a question of fact peculiar to the case in which it is presented. Here, the finding that the time records and other explanations of counsel were adequate is a finding that has already been reviewed three times: by the district court's adoption of the magistrate's report (R.2-39), by the Court of Appeals'

decision (810 F.2d at 1024), and by the Court of Appeals' denial of rehearing (Pet., Appendix B). A further review of that question of fact by this Court is not warranted.

3. The Petition for Certiorari seriously misrepresents the evidence and the district court's holding.

The Petition misrepresents the evidence received on the attorneys' fees issue. While Respondents will not attempt to correct each such misrepresentation, they cite the following examples.

The Petition for Certiorari selectively edits a sentence from Respondents' pleading, filed in response to the magistrate's order directing

plaintiffs to specify, "to the extent feasible," the class member to whom a particular time entry referred. (Pet., p.5). The whole text of that pleading reveals that time attributable to work with individual class members was identified by class member name in the vast majority of instances and that the portion of the sentence quoted by respondents means only that a given time entry, say, two hours, cannot be divided further among the class members listed:

> Pursuant to the Magistrate's order of August 27, 1985, plaintiffs submit this further specification of time, specifying to the extent feasible the class members to whom time entries referred. Attached hereto are copies of the time logs of the lawyers involved which encompass the times during which the stage II hearings were held. Where a time entry refers to a

> particular class member, it has been underlined in red ink. Additionally, where the time logs refer to stage II hearings without listing a class member's name, a comparison of the hearing dates has been made and the names of the class members involved are printed in the margin. However, in both cases, because all time expended on a given date is listed in a single sum, with no further breakdown as to time spent on particular services, it is not feasible in most instances to attribute a particular amount of time to a certain class member.

(R.1-28-29.) Similarly, the Petition does not reveal that attached to that pleading were some 30 pages of time records annotated by hand with the names of the class members to whom time entries referred. (R.1-29-59.)

Petitioners likewise misrepresent the district court's holding when they say that the magistrate "estimated from the inappropriate time records and from

his personal recollection" of the stage II hearings in making a 12.2% reduction in plaintiffs' fees (Pet., p.5), and when they cite only one paragraph of the magistrate's specific findings on this issue and call it "his best guesswork" (Pet., p.10). The Court of Appeals viewed the matter differently, terming the magistrate's attorneys' fees opinion "an exhaustive recommendation following the analysis in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir.1974)," and stating that "[t]he rationale for this reduction is carefully set out in the recommendation." 810 F.2d at 1023.

The record in fact reflects that the magistrate made a number of specific findings of fact upon which he based his

calculation of the fee award and its 12.2% reduction attributable to the unsuccessful class members. The magistrate's written recommendation was not attached to the copies of the Petition served on undersigned counsel. Since there is a risk that it was omitted from copies filed with this Court, we set out the following specific findings:

> Stage II monetary award proceedings in a class action have attributes both of a single claim by the class and individual claims by its members. Cf. Holmes v. Continental Can Co., 706 F.2d 1144, 1154-60 (11th Cir.1983). While it is possible to engage in extended theoretical discussion regarding the precise nature of Stage II proceedings, the Court in Hensley v. Eckerhart, supra, directed the district courts to engage in a practical analysis of the actual course of the litigation in deciding the "degree of success" issue. In

that regard, the Magistrate (who conducted the Stage II proceedings to date) makes the following findings:

a. Except for individual claim statements, interrogatory answers, depositions, and summary judgment responses on behalf of each claimant, most pretrial proceedings were focused not on individual claims but on the Board's policies and practices. Thus, discovery regarding the Board's "G-1 endorsement" defense, its "no application" defense, and its "rotation" defense was activity not divisible between successful and unsuccessful claimants. That activity would have been necessary if only successful claims were advanced.

b. In formulating the overall recommendation, the Magistrate on a number of occasions relied on evidence adduced at an unsuccessful claimant's hearing in support of findings on other claimants' cases, on the general Board defenses, or in attempting to reconstruct the actual progression process. It is not possible to quantify precisely the number of such occasions, but the number is substantial.

c. At the onset of the individual Stage II hearings, all

parties appeared to agree that the evidence on a particular claim might be relevant to other claims. At the conclusion of the first hearing, the following colloquy occurred:

> Magistrate: What do you all -- I hate to phrase it this way -- what do you all want me to do with respect to making the individual recommendations here? Do you -- and I'm just seeking the views of either side here as to whether with respect to liability only -- forget the money for a minute -- I am now in a position to make a recommendation with respect to Mr. Clarke.
>
> Plaintiffs' counsel: Judge, our response is this after conferring: As much as we want a quick ruling, one difficulty with that is that we had assumed that proof would be cummulative, that evidence received would affect the subsequent hearings to be considered. And we expect to show that there are some folks promoted to schools with A-08 certificates and these type things.
>
> . . . .
>
> Defense counsel: Your honor, we have also some evidence

> which we think that once the Court has an opportunity to look at the overall evidence, it would be cummulative in nature and the ruling on a case-by-case basis at this point in time might be absent some other evidence the Court might need to take into consideration.
>
> d. Having reviewed the time records submitted by Plaintiffs' counsel and having considered the actual course of proceedings, the Magistrate concludes that on average, the attorney time specifically referable to a particular claim -- for client interviews, records review, deposition attendance, discovery responses, and attendance at the evidentiary hearings -- totaled on the order of 5 to 6 hours. Applying that average, the time spent specifically devoted to unsuccessful claims approximates 380-456 hours. No more than 250 hours of that time can be said to be unrelated to the overall success achieved by Plaintiffs.

Whereas, in this case, the trial court has made a meaningful calculation of the hours spent on successful and

unsuccessful claims, this Court is not likely to set it aside as clearly erroneous. See City of Riverside v. Rivera, 106 S.Ct.2686, 2692 n.4 (1986) (rejecting a similar challenge to the adequacy of attorneys' records because "[t]he District Court ... does not appear to have shared this view").

4. Petitioners have abandoned their argument that an enhancement is inappropriate in this case.

In the last sentence of the Petition for Certiorari, Petitioners assert that respondents are not entitled to an enhancement of their fees in this action. (Pet., pp.13-14.) The Court of Appeals specifically held that Petitioners had abandoned that issue.

810 F.2d at 1025, n.6.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that on this 29 day of May, 1987, a copy of the foregoing RESPONDENTS' BRIEF IN OPPOSITION was served upon the following counsel of record:

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by depositing same in the United States Mail, postage prepaid.

COUNSEL FOR RESPONDENTS